

Kluwer Mediation Blog

Patience

Rick Weiler (Weiler ADR Inc.) · Thursday, May 23rd, 2013

“They also serve, who only exchange offers.”

A recent mediation experience serves to reinforce the value of patience in mediation – for the parties and for the mediator. The tort mediation, involving a single plaintiff and two insurers started at 10 am and concluded 8 hours and 15 minutes later. The following is the sequence of proposals and counter-proposals.

Plaintiff (P) 1 – Sets out in detail how the full value of the claim, including general damages, med-rehab, house keeping, past and future income losses totals close to \$1 million and then offers, for the purposes of mediation, to accept **\$693,713, plus prejudgement interest and costs (++)**.

Defendant 1 (D1) and 2 (D2) send me back with a joint proposal of **\$20,000, all inclusive**.

P responds with a counter of **\$645,000 ++**.

This takes us to 12:30 pm at which time D1 and D2 send me back with a joint proposal of **\$30,000, all inclusive**.

P makes a further offer of **\$500,000 ++**.

D1 and D2 jointly respond with **\$50,000, all inclusive**.

At 1:25 P makes a new offer of **\$450,000 ++**.

At 1:40 D1 and D2 make a further joint offer of **\$72,000, all inclusive**.

P offers again. This time at **\$400,000 ++**.

This brings another joint response from D1 and D2 at **\$80,000, all inclusive**.

P's 6th offer is **\$375,000 ++**.

D1 and D2 jointly respond with **\$87,500, all inclusive**.

P counters with **\$300,000, but this time it is only plus costs** (i.e. the demand for interest has been dropped).

D1 and D2 jointly counter at **\$92,500, all inclusive**.

P's next offer was **\$305,000, all inclusive** (representing a drop of about 17 per cent from P's previous offer).

The next joint offer from Defendants was **\$95,000, all inclusive**.

P dropped to **\$290,000, all inclusive**.

D1 and D2 went to **\$97,500, all inclusive**.

P's 10th offer was **\$285,000, all inclusive**.

Defendants jointly responded with **\$100,000, all inclusive** and asked me to say, "That's it!"

P responded with **\$265,000, all inclusive**, "final offer".

A lengthy caucus discussion with P led to me being asked to see if I could get **D1 only to \$75,000, all inclusive**. I was told I should send D2 home as there was no chance of settlement. I pause to explain that there were different liability issues vis-a-vis the two Defendants. P assessed it had more risk vs. D1 and so wanted to push to settle that part of the case.

I then separated D1 and D2 but asked D2 to remain and be patient.

I told D1 I had a "high degree of confidence" that their part of the case could be settled for \$75,000. D1 responded that their best number was **\$60,000, all inclusive**.

At this point I prepared a Settlement Agreement at **\$60,000** (I carry a generic template with me at all mediations) had D1 sign it and presented it to P. It was accepted.

I now asked P for a further final offer for D2 and was asked to convey **\$150,000, plus prejudgment interest and costs**.

D2 expressed some frustration at what it perceived to be the perfidy of D1 (and the mediator) but ultimately accepted my advice to press on, bolstered by what we had observed to this point. D2 countered at **\$70,000, all inclusive**.

P countered at **\$165,000, all inclusive**.

At 5:10 pm, D2 responded at **\$78,500, all inclusive**. All further exchanges were also all inclusive.

At 5:15 pm P offered **\$155,000**.

At 5:17 pm D2 offered **\$85,000**.

At 5:19 pm P offered **\$147,500**.

At 5:20 pm D2 offered **\$92,500**.

5:21 saw P offering **\$140,000** and I was asked to say that P was "getting close".

D2 countered with **\$97,500** at 5:26 noting that it too was “getting close”.

P responded with **\$135,000** – “final offer”

D2 responded by producing their own form of Settlement Agreement which they filled in with **\$100,000** and asked me to advise P that this was their “final offer”.

P was both tired and frustrated as it was now after 6 pm and refused my request to suggest another number. I then asked P if it would “split” (i.e. go to the mid-point, **\$117,500**) if D2 would do the same and left the room before they had a chance to answer.

I caucused with D2 and advised of the mood in P’s room. I asked the same question I had just asked in the other room and with some reluctance D2 responded, “yes”. I then stuck my head in P’s room and asked if they had considered my question. They responded that, reluctantly, their answer was “yes”. I announced the case settled at **\$117,500** at 6:15.

To summarize, the **total settlement to P was \$177,500**, all inclusive and was achieved after a total of 35 exchanges of numbers.

There were a number of times during the negotiation when I suggested options for accelerating or streamlining the exchanges but all sides signalled that they were content to carry on as they were. For much of this mediation I was simply a bearer of numbers. There were two instances when I was asked privately to confirm with counsel their own perceptions regarding litigation risk and I was happy to do so.

This settlement, that started with a gap of \$780,000 after the first exchange of offers, saved the parties a 3 week trial and while all parties were somewhat dissatisfied at the dollar value of the outcome they were very satisfied with the way the process has unfolded. I always say that if everyone is unhappy with the settlement number that’s a sure sign of a good settlement.

My message to mediators arising from this mediation (and so many others like it over the past 22 years) is “be patient” and “trust the process”.

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The graphic features a black background with white text and a circular icon. The icon depicts a group of five stylized human figures, with a magnifying glass positioned over the central figure. The background is accented with horizontal lines in blue and green.

This entry was posted on Thursday, May 23rd, 2013 at 8:56 am and is filed under [‘Money-only’ Cases](#), [Commercial Mediation](#), [Deal Mediation](#), [Efficiency](#), [Impasse](#), [Mediation Outcomes](#), [Practical Challenges for Mediators](#)

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